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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CHRISTENSEN, GLASER, FINK, JACOBS, WEIL & SHAPIRO, Plaintiff and Respondent, v. COVE MANAGEMENT PARTNERS, LLC et al., Defendants and Appellants.	B217316 (Los Angeles County Super. Ct. No. BS 119749)

APPEAL from an order of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

Keith A. Fink and Associates, Keith A. Fink and Andrew C. Pongracz for Defendants and Appellants.

Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer and Vincent S. Green for Plaintiff and Respondent.

* * * * * *

Respondent Christensen, Glaser, Fink, Jacobs, Weil & Shapiro, LLP (Firm) represented appellants Cove Management Partners, LLC (Cove), Robert Kotick and Andrew Gordon, who declined to pay the attorney fees charged by Firm. An arbitrator awarded Firm $930,457[1] in fees and costs, as well as attorney fees associated with the arbitration. The trial court confirmed the award and we affirm the trial court's order.

FACTS

1. The Firm, Appellants and the Underlying Litigation[2]

Through Cove, Kotick and Gordon own a private aircraft; Phillip Berg was the pilot and Cynthia Medvig was the flight attendant. Medvig was fired and sued appellants and Berg for sexual harassment and other wrongs.

Kotick retained Firm after he became dissatisfied with Sullivan & Cromwell as defense counsel. Kotick repeatedly (and heatedly) told Firm that he was not interested in settling, but rather in destroying Medvig and her lawyer at whatever the cost. Informed at one point that the Medvig case could be settled for between $200,000 and $400,000 (the case eventually settled for $675,000), Kotick rejected settlement in colorful terms. The ensuing pace and vitriol of this litigation is suggested by the circumstance that no less than five summary judgment motions were filed, two of them by Medvig. Unsurprisingly, the discovery process was reduced to warfare that was as intense as it was costly.

Firm had been retained on April 27, 2007. Although Firm had been billing monthly, Kotick having been advised ahead of time that the monthly billings would be between $150,000 and $200,000, by September 15, 2007, *nothing* had been paid. When Firm asked for payment of its fees, which at the end of August stood at $709,219, Kotick eventually sent a check for $200,000 with the statement that this was in full settlement of all fees and costs up to September 15, 2007.

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[1] Cents are omitted throughout.

[2] Our account of the facts is based on the arbitrator's memorandum, which stands unchallenged on the background facts.

The inevitable took place in December 2007 when Firm filed a motion to be relieved as counsel. This motion was granted and Firm agreed to remain on the case to assist new counsel with a pending motion for summary judgment; Firm agreed to limit itself to $50,000 for this service.

By September 2007, Firm's fees and costs stood at $1,029,810. For various reasons, $85,927 and $7,072 were voluntarily written off by Firm. The sum that Firm demanded in arbitration was $1,188,457. In the ensuing arbitration, the partner handling appellants' case testified that she, Patricia Glaser, would have recommended an additional reduction of $250,000 in the fees charged.

2. The Arbitration

The parties agreed to dispense with nonbinding arbitration and agreed to binding arbitration. The retainer agreement between Firm and appellants included a clause calling for binding arbitration; the retainer agreement was signed by the three appellants. Berg, the pilot, did not sign the retainer agreement.

The arbitration, held at JAMS, took six days. There was no court reporter present. Firm did not proceed against Berg in the arbitration because he had not signed the retainer agreement. Firm was represented by outside counsel in the arbitration and continues to be so represented in this appeal.

Appellants propounded five defenses in the arbitration. They claimed that Firm's fees were unreasonable, that Firm had erred in not obtaining conflict waivers as between the three appellants, Firm could not enforce the retainer agreement because Berg had not signed it, Firm's recovery should be limited to a quantum meruit measure and the fees should be reduced by $250,000, as Ms. Glaser would have recommended.

The arbitrator, Charles G. Bakaly, Jr., rejected all five defenses.

The arbitrator concluded that the substantial fees that were generated were the result of Kotick's insistence on a highly aggressive defense. Kotick, chief executive officer of Activision, and Gordon, a senior director of Goldman Sachs & Co., had agreed to pay the fees, were sophisticated in the ways of business and the law, and understood that the scorched earth tactics they demanded would translate into substantial legal fees.

Moreover, they had been warned ahead of time that the kind of representation they were demanding could cost $200,000 per month. The arbitrator concluded that the fees charged were reasonable.

The arbitrator found that conflict waivers were not required because Sullivan & Cromwell had procured them from appellants; moreover, there were no conflicts. The retainer agreement was valid and enforceable even though Berg had not signed it, and it complied with the requirements of the Business and Professions Code. Because the retainer agreement was enforceable, a quantum meruit measure of fees was not appropriate. Finally, while Ms. Glaser would have recommended a reduction of $250,000, no agreement about such a reduction was ever concluded.

Relying on what the arbitrator termed to be his equitable powers, the arbitrator reduced the fees claimed by $250,000. This left a balance of $938,457. Instead of applying the interest rate of 18 percent set forth in the retainer agreement, the arbitrator ruled that a 10 percent annual interest rate would apply.

The award was against appellants and made no mention of Berg.

The retainer agreement provided that the party prevailing in any dispute between Firm and appellants could recover attorney fees and costs. The arbitrator concluded that attorney fees of $327,792 and costs of $152,105 were reasonable and awarded Firm these sums.

Appellants did not seek a correction of the award from the arbitrator.

3. Proceedings in the Trial Court

On March 24, 2009, Firm filed a petition in the trial court to confirm the award against appellants.

Appellants responded by filing, on April 20, 2009, a request to correct the award. The request to correct contended in substance that Firm had billed at excessive rates for staying on the case as an accommodation after it had withdrawn from the case. The request claimed that Firm had agreed to render this service for a flat fee of $35,000 but that it had actually billed $146,253 for this posttermination work. The correction requested was a reduction of $111,753 in the award.

Firm replied to the request to correct the award by raising a number of procedural objections. First, Firm pointed out that the request to correct the award was not an opposition to Firm's petition to confirm the award; as a consequence, Firm's petition had to be granted. Second, if the request to correct was construed as an opposition, it was late, since the opposition had to be filed within 10 days of the service of the petition. (Code Civ. Proc., § 1290.6.) Third, the request to correct could not be construed to be a petition to vacate the award because the request to correct was served under the same case number as the petition, i.e., the request to correct did not commence an independent action and a petition to vacate was an action independent of the petition to confirm. Fourth, under JAMS's rules, appellants were required to first request the arbitrator to correct the award and this they had not done. Fifth, Firm objected to all of the factual assertions of the request to correct, including the assertion that Firm billed $146,253 for posttermination work when it had agreed to do this work for a flat fee of $35,000.

Substantively, Firm contended that the request to correct was in actuality an attempt to relitigate issues resolved in the arbitration.

Appellants replied by requesting that the trial court treat the request to correct the award as an opposition to the petition to confirm the award.

The trial court held a hearing on the aforesaid matters on April 30, 2009. These were its rulings: (1) Firm's petition to confirm the award was granted. (2) The court treated appellants' request to correct as an opposition to the petition to confirm. (3) All of Firm's objections to the factual assertions of the request to correct were sustained. (4) The request to correct the award was denied. (5) The court entered judgment for Firm in the amount of $1,551,215.

The notice of appeal filed by appellants states in relevant part that the appeal was "from the JAMS Arbitration Final Award in JAMS Case No. 1220038152 issued on March 5, 2009, in which Notice of Entry of Judgment was filed on May 1, 2009." (The notice of entry of judgment referred to the trial court's judgment of April 30, 2009.)

DISCUSSION

1. The Notice of Appeal Is Liberally Construed as an Appeal from the Judgment

Firm contends that the appeal is from the nonappealable award of the arbitrator and that the appeal should therefore be dismissed.

A notice of appeal is to be liberally construed in favor of its sufficiency. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 20.) "A notice of appeal erroneously specifying a nonappealable order, rather than the appealable judgment itself, may be construed as being taken from the judgment. [Citations.]" (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 3:130:1, p. 3-54 (rev. #1, 2008).) A notice of appeal may be liberally construed "if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced." (*Luz v. Lopes* (1960) 55 Cal.2d 54, 59.)

While Firm is correct that the arbitrator award is not an appealable order (in fact, it isn't even an order), the notice of appeal refers to the notice of entry of judgment of May 1, 2009, *and* there is in fact a judgment. We therefore construe the notice of appeal as one from the order denying (dismissing) the petition to correct the award.[3]

2. Appellants' Failure to File a Petition to Vacate the Award Bars This Appeal

Appellants violated every procedural rule that they encountered on their way to this court.

They began by failing to request the arbitrator to correct the award. Next, they failed to file a timely opposition to Firm's petition to confirm the award. They then filed an unauthorized pleading to "correct" the award. They never filed a petition to vacate the award. They requested that their request to correct be treated as an opposition, which, by that time, was over a month too late. They filed a highly dubious notice of appeal, which had to be "construed" in order to save it as an effective notice of appeal.

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[3] "An aggrieved party may appeal from: [¶] . . . [¶] (b) An order dismissing a petition to confirm, correct or vacate an award." (Code Civ. Proc., § 1294.)

In this court, appellants have propounded arguments that flout the well-established rule that "an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 6.)

While an appellate court can overlook one or perhaps even two procedural slips, when, as here, appellants systematically violated every procedural provision they came across, we are singularly unmoved to bend (or ignore) the rules one more time for appellants' benefit.

The applicable rule is this:

"Our reading of the statutory scheme . . . compels the conclusion that a party to an arbitration may not circumvent the 100-day time requirement in which to seek the vacation of an award by attempting to raise his or her objections to the award in an appeal from the judgment entered following an order of confirmation." (*Louise Gardens of Encino Homeowners' Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, 659 (*Louise Gardens*); accord, *Berg v. Traylor* (2007) 148 Cal.App.4th 809, 823.)

The relief that appellants seek in this appeal is that we should, for the reasons given by them, reverse and remand with instructions to vacate the award.

There is, however, no doubt that appellants failed to file in the trial court a petition to vacate the award. Under no conceivable theory can their request to correct the award be "construed" to be a petition to vacate the award. If a party requests to correct the award by striking from an award of over $1.5 million the sum of $111,753, it is patent that such a party concedes that the great bulk of the award is appropriate. It is simply out of the question to treat the request to correct the award as a petition to vacate the award.

In their reply brief, appellants seek to sidestep *Louise Gardens* with the specious argument that, unlike in *Louise Gardens*, appellants in this case "filed a timely petition challenging the award on April 20, 2009, only forty-four days after being served with the award on March 6, 2009." This is not true. Appellants sought to have the award *corrected* and not vacated. As noted, this means that, but for the inclusion of $111,753 in

the award, appellants were content with the award and did *not* challenge it on April 20, 2009, or at any other time in the trial court.

While we think that the statement of the rule in *Louise Gardens*, disposes of the matter, we add one observation. It is a fundamental principle that an appellate court will not consider defects or rulings if those defects and rulings have not been presented first to the trial court by some appropriate method. (See generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, pp. 458-459.) To entertain on appeal appellants' petition to vacate when such a petition was not presented to the trial court would be a manifest violation of this important rule of appellate practice.

That appellants are barred from seeking in this appeal to have the award vacated is also confirmed by the circumstance that this appeal is from the order dismissing their petition to correct the award. (See fn. 3, *ante*.) But the contentions that appellants advance in this appeal far exceed the scope of corrections of the award. Not having filed a petition to vacate in the trial court, appellants cannot appeal from the denial of such a petition and must therefore limit themselves in this appeal to the correction of the award.

Frequently, when we find a procedural bar to an argument, we will note the bar but nonetheless address the argument in order to dispose of the matter on the merits, which is preferable to procedurally barring an argument.

We decline to do so here.

DISPOSITION

The order is affirmed. Respondent is to recover its costs on appeal.

FLIER, J.

We concur:

BIGELOW, P. J.

GRIMES, J.